

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

COY WHITE)	
Claimant)	
VS.)	
)	Docket No. 1,041,568
PRATT INDUSTRIES)	
Respondent)	
AND)	
)	
IMA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the October 29, 2008, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant injured his left hand on July 24, 2008, when it became caught in a machine. The Judge rejected respondent's argument that claimant should be denied workers compensation benefits because claimant willfully failed to use a safety guard. Instead, the Judge determined claimant's accident occurred while claimant was setting up the machine as he had customarily done in the past.

Respondent argues claimant's description of the accident is not credible but concocted as there is no way his hand would have become caught in the machine in the manner claimant alleges. In addition, respondent contends the accident would not have occurred had claimant had all the safety guards in place and that claimant's past safety violations established his headstrong attitude against following respondent's safety rules. Consequently, respondent requests the Board to reverse the October 29, 2008, Order.

Conversely, claimant argues the Order should be affirmed. Claimant argues his accident occurred while he was performing his job in the manner he had been instructed and in the manner he regularly set up the machine in question. He argues he did not remove the safety guard in issue and that he simply forgot to place the guard back on the machine. Claimant, who had never received a safety violation before Nathan Hale became his supervisor, maintains his alleged previous safety violations were more the result of a

new supervisor “snapping the whip, than claimant blustering about in perpetual defiance.”¹ Finally, claimant asserts the true issue before the Judge was whether he or his supervisor, Mr. Hale, was more credible.

The only issue before the Board is whether respondent has satisfied its burden of proof that claimant’s injury occurred as the result of claimant’s willful failure to use a safety guard.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties’ arguments, the undersigned Board Member finds as follows:

While setting up a labeler machine at work on July 24, 2008, claimant caught his left hand in the machine while he was adjusting glue bands. Claimant described the accident, as follows:

I was setting up the machine, and I had to adjust some of the glue bands because the last person had used it had cleaned it. Every time you clean it, you always move your glue bands. I was putting the glue bands in the right spot, where they are supposed to be at in the groove. I had a few of them that was crooked. I had my idler roller on, bands were going around. I was trying to do like I normally do, put my hand on the band and make sure they are flat and run my hand up across the band, each one of them, until they all flattened down. That is what I was doing at the time. The last band I was doing, I was running my hand up across it and my hand went down into the rollers, between the rollers.²

Claimant testified a guard that sets over the glue had been taken off the machine when the machine was cleaned but that he normally replaced the guard after setting the glue bands.

Before I put the guard -- before I load my glue up, I set the guard on there. That is what we normally do. So the guard was -- I was fixing the glue bands because the guard didn’t have nothing to do with my setting-up procedure at that time. Then once I finished with the bands, I normally grab the guard and set it on there and then turn on the glue and everything starts pumping.³

But more importantly, claimant testified he was following his normal procedure.

¹ Claimant’s Brief at 3 (filed Dec. 17, 2008).

² P.H. Trans. (Oct. 28, 2008) at 11, 12.

³ *Id.* at 14.

A former co-worker, John Trotter, who left respondent's employ in August 2008 after working there for over one and one-half years, testified that he worked alongside claimant and never observed him operate the machine in question or adjust the glue bands in any way other than what was customary.

Shortly after the injury, claimant was cited for violating a safety rule and terminated. But this was not the first time claimant was written up for violating company rules. Claimant received a written warning in February 2008 for wearing his wedding ring. In April 2008 claimant received a written warning for having his cell phone in his tool box, which violated a company rule against having cells phones on the company floor. And in June 2008 claimant received written warnings for failing to follow instructions and reversing a label and then for cleaning a drum on a machine while it was running. Although claimant contends he did not commit the latter violation, claimant signed the disciplinary report and received a 3-day suspension.

Respondent presented the testimony of claimant's supervisor, Nathan Hale. Mr. Hale indicated claimant's accident could not have occurred in the manner claimant described due to the layout of the machine. Mr. Hale also testified the accident could not have occurred if the safety guard in question had been in place. Moreover, Mr. Hale testified the only way the glue bands can be adjusted on the machine is at the idler roller, which is below where claimant got his hand caught between the metering roller and applicator roller. Mr. Hale is convinced claimant was violating safety rules at the time of the accident.

Respondent contends claimant's accident occurred due to his willful failure to use a guard or protection. Based upon his eight or nine years of experience operating that machine, Mr. Hale speculates that at the time of the accident claimant was using his right hand to adjust the glue bands and had his left hand braced on the bar upon which the safety guard is supposed to rest when something distracted claimant and his left hand went forward or downward into the rollers.

K.S.A. 2007 Supp. 44-501(d)(1) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

And "willful" as used in the above-quoted statute contemplates an element of intractableness or stubborn refusal to abide by instructions regarding safety rules or the

use of guards or safety devices.⁴ Moreover, once a worker meets the burden of proving the right to workers compensation benefits, the burden of proving a defense shifts to the employer.⁵

In addition, K.A.R. 51-20-1 states:

The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The Judge rejected respondent's contentions and found claimant was injured while setting up the machine as he had customarily done in the past. The undersigned agrees as claimant's testimony and that of Mr. Trotter is credible. The evidence establishes that at the time of the accident claimant was setting up the labeler machine in the manner that he had been taught. Accordingly, respondent may not avail itself of the defense that claimant willfully failed to utilize a safety guard or device.

In addition, the undersigned finds respondent failed to satisfy its burden of proof that claimant's failure to utilize the safety guard resulted from a stubborn refusal or an element of intractableness to follow instructions or safety rules. The fact that claimant received written warnings for wearing his wedding ring (which he apparently did on only one occasion) and for having his cell phone in his tool box (again which he apparently did on only one occasion) falls short of convincing the undersigned that claimant willfully refused to observe safety rules. Only the charge that claimant was cleaning a drum while a machine was running (which he denies actually happened) carries much weight with the undersigned.

Finally, claimant is correct that his entitlement to benefits hinges upon his credibility. The Judge had the opportunity to observe all three witnesses testify at the preliminary hearing. In finding for claimant, the Judge implicitly found that claimant was credible. In this instance, the undersigned finds some deference should be given the Judge's determination.

In conclusion, the evidence establishes claimant was negligent but no more, no less. The evidence does not establish that claimant's accident resulted from stubbornness or intractable conduct. Moreover, the evidence at this juncture establishes that claimant's accident occurred as he performed his job duties in his customary manner. The

⁴ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

⁵ *Poole v. Earp Meat Co.*, 242 Kan. 638, 750 P.2d 1000 (1988).

undersigned Board Member affirms the Judge's finding that claimant is entitled to receive workers compensation benefits for his July 24, 2008, accident.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the October 29, 2008, Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: R. Todd King, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

⁶ K.S.A. 44-534a.